

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

UNITED STATES, ) CR-09-00487-RMW  
)  
PLAINTIFF, )  
) JUNE 19, 2012  
VS. )  
) VOLUME 7  
ALBERT KE-JENG HU, )  
)  
DEFENDANT. ) PAGES 918-971  
\_\_\_\_\_)

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE RONALD M. WHYTE  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: U.S. ATTORNEY'S OFFICE  
BY: JOSEPH FAZIOLI  
TIM LUCEY  
150 S. ALMADEN BLVD, STE 900  
SAN JOSE, CA 95113

FOR THE DEFENDANT: ATTORNEY AT LAW  
BY: JERRY FONG  
PO BOX 1040  
PALO ALTO, CA 94302-1040

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

1 SAN JOSE, CALIFORNIA

JUNE 19, 2012

2 P R O C E E D I N G S

3 (WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD OUT  
4 OF THE PRESENCE OF THE JURY:)

5 THE COURT: OKAY. LET ME FIND OUT FIRST  
6 IF THE GOVERNMENT HAS ANY OBJECTIONS TO THE  
7 PROPOSED INSTRUCTIONS AND ANY ADDITIONS.

8 MR. FAZIOLI: WE DO, YOUR HONOR. AND  
9 WE'VE CONFERRED WITH THE DEFENSE ABOUT SOME OF THE  
10 INSTRUCTIONS. AND THERE ARE SOME INSTRUCTIONS,  
11 COMMENTS AND PROPOSAL CHANGES TO THE INSTRUCTIONS  
12 AND THE VERDICT FORMS THAT THE PARTIES AGREED TO  
13 AND THERE'S SOME WE DON'T AGREE WITH. SO I DON'T  
14 KNOW HOW THE COURT WOULD LIKE TO PROCEED.

15 THE COURT: WHY DON'T YOU FOLLOW ME WHAT  
16 YOU AGREED SHOULD BE CHANGED AND SEE IF I AGREE  
17 WITH IT.

18 MR. FAZIOLI: THE FIRST IS THAT THERE IS  
19 AN ADDITION OF A POSSIBLE INSTRUCTION. THE  
20 GOVERNMENT'S PROPOSED JURY INSTRUCTION HAD AN  
21 INSTRUCTION 4.1 ON PAGE 29. THIS WAS NINTH CIRCUIT  
22 MODEL CRIMINAL INSTRUCTION 4.1 WHICH WAS STATEMENTS  
23 BY DEFENDANT.

24 THE COURT: I THOUGHT ABOUT THAT. I  
25 DON'T THINK IT'S APPLICABLE. IT'S REALLY DESIGNED

1 FOR THE CONFESSION CASE AND THIS ISN'T THAT. I  
2 THINK IT WOULD BE KIND OF CONFUSING TO GIVE IT TO A  
3 JURY.

4 MR. FAZIOLI: OKAY. WE JUST WANTED TO  
5 RAISE IT.

6 THE COURT: WHAT'S YOUR FEELING,  
7 MR. FONG?

8 MR. FONG: I DON'T FEEL STRONGLY ONE WAY  
9 OR THE OTHER.

10 THE COURT: YOU DON'T OBJECT TO ME NOT  
11 GIVING IT.

12 MR. FONG: I DO NOT OBJECT TO THE COURT  
13 NOT GIVING THAT.

14 THE COURT: OKAY.

15 MR. FAZIOLI: JURY INSTRUCTION NUMBER  
16 SEVEN, I BELIEVE THAT THE MODEL INSTRUCTION THAT WE  
17 PROPOSED HAS A SENTENCE, AFTER YOU SHOULD CONSIDER  
18 BOTH KINDS OF EVIDENCE, THAT THERE WAS A SENTENCE  
19 SAYING EITHER CAN BE USED TO PROVE ANY FACT. AT  
20 LEAST THAT WAS OUR UNDERSTANDING OF THE MODEL  
21 INSTRUCTION AND WE WERE GOING TO PROPOSE THAT BE  
22 ADDED TO THAT LANGUAGE.

23 THE COURT: I DON'T HAVE ANY PROBLEM WITH  
24 THAT, I'M JUST CURIOUS --

25 MR. FONG: I DO NOT HAVE ANY OBJECTION TO

1        THAT ADDITION, YOUR HONOR.

2                THE COURT:    YEAH, I WILL ADD THAT.

3                MR. FAZIOLI:    OKAY.

4                MR. LUCEY:    THANK YOU, YOUR HONOR.

5                MR. FAZIOLI:    JURY INSTRUCTION NUMBER 11,  
6        THERE APPEARS TO BE A TYPO, IT SAYS, A SEPARATE  
7        CRIME WAS CHARGED AGAINST THE MR. HU.    MAYBE YOU  
8        SHOULD TAKE OUT THE WORD THE.

9                THE COURT:    WHICH IS THAT?

10               MR. FAZIOLI:    NUMBER 11.

11               THE COURT:    THAT IS CORRECT.    THAT SHOULD  
12        GO.    I WILL TAKE THAT OUT.

13               MR. FAZIOLI:    THEN JURY INSTRUCTION 13,  
14        THE PARTIES DID HAVE A DISCUSSION ABOUT THE  
15        SUBSTANCE.    I UNDERSTAND THE DEFENSE HAD A PROPOSED  
16        EDIT TO IT.    BUT THE AGREEMENT, I THINK, IS ON A  
17        MODIFICATION.    THERE'S A TABLE IN THIS DOCUMENT  
18        WHICH IS REFLECTIVE OF THE INDICTMENT AND I'M  
19        PASSING UP TO THE COURT NOW, THERE WAS A  
20        STIPULATION THAT THE PARTIES ENTERED INTO REGARDING  
21        WIRE COMMUNICATIONS AND TRANSMISSIONS.

22               AND THIS IS WHERE THE PARTIES AGREED THAT  
23        CERTAIN WIRE COMMUNICATIONS AND TRANSMISSIONS TOOK  
24        PLACE, WHICH WE WOULD SUBMIT FULFILLS THE  
25        INTERSTATE OR INTERNATIONAL COMMERCE NEXUS AND ALSO

1 FULFILLS THE NOTICE REQUIREMENT THAT THESE WERE THE  
2 WIRES THAT THE PARTIES WERE TALKING ABOUT.

3 THE GOVERNMENT REQUESTS, MY UNDERSTANDING  
4 THE DEFENSE IS IN AGREEMENT WITH THIS, THAT THE  
5 TABLE IN THIS INSTRUCTION NOT BREAK OUT DETAILS  
6 ABOUT UBS AND FIDELITY AND OTHER ENTITIES, BUT  
7 INSTEAD TRACK SOMEWHAT THE LANGUAGE OF THE  
8 STIPULATION, FOR EXAMPLE TO READ, COUNT ONE, DATE  
9 2-8-05, THEN THE DESCRIPTION THAT'S IN THE  
10 STIPULATION, INTERSTATE WIRE TRANSFER HUNDRED  
11 THOUSAND DOLLARS SENT ON OR BEHALF OF MR. LIN.

12 THE COURT: WOULD IT WORK IF I JUST  
13 CHANGED THE INSTRUCTION TO USE, TO ADD A COLUMN FOR  
14 THE COUNT AND USE THE TABLE ON YOUR PROPOSAL?

15 MR. LUCEY: I THINK WE ARE SAYING THE  
16 SAME THING, YOUR HONOR.

17 MR. FAZIOLI: YES. WE COULD E-MAIL YOU A  
18 WORDPERFECT COPY OF THE STIPULATION. AND I THINK  
19 IT WOULD WORK IF IT WERE COUNT ONE, YES. THE  
20 COLUMN FOR COUNT ONE, THEN THE REMAINDER JUST AS  
21 TRACKED AND THE STIPULATION BETWEEN THE PARTIES.

22 THE COURT: OKAY. THAT'S FINE.

23 MR. FAZIOLI: THEN LASTLY, SOMEWHAT  
24 SIMILAR TO THAT ON THE VERDICT FORM, WE WOULD, TO  
25 TRACK THAT WE WOULD REQUEST THAT, AND WE CAN TRY TO

1 DO THIS ELECTRONICALLY IF YOU WANT US TO E-MAIL THE  
2 VERDICT FORM, THAT IT READ FOR COUNT ONE, GUILTY OR  
3 NOT GUILTY OF THE CHARGE OF WIRE FRAUD WITH RESPECT  
4 TO, AND WE COULD SAY, A WIRE SENT OR OR BY ON  
5 BEHALF OF MR. LIN ON OR ABOUT FEBRUARY 8TH, 2005,  
6 AS DESCRIBED IN INSTRUCTION 13.

7 MR. FONG: I DON'T HAVE ANY OBJECTION TO  
8 THAT, YOUR HONOR.

9 THE COURT: OKAY.

10 MR. FAZIOLI: SO THOSE ARE THE  
11 DIFFERENCES THAT THE PARTIES ARE IN AGREEMENT  
12 ABOUT.

13 AS FOR THE ONES WHERE WE HAD PROPOSED --  
14 I DON'T KNOW WHETHER YOU WANT TO GO THROUGH THE  
15 ONES WHERE THE DEFENSE HAS AN ISSUE AND THEN WE CAN  
16 TAKE OUR POSITION ON IT OR JUST GO THROUGH THE ONES  
17 WE HAVE

18 MR. LUCEY: YOUR HONOR, I'M SORRY TO  
19 INTERRUPT MY COLLEAGUE, MR. FAZIOLI. I WAS GOING  
20 TO SUGGEST NUMBER EIGHT.

21 MR. FAZIOLI: SO, IN TERMS OF POSSIBLE  
22 OBJECTIONS, NOT REALLY OBJECTIONS BUT WE NOTICE  
23 JURY INSTRUCTIONS 5 AND 6 DIFFER SLIGHTLY FROM THE  
24 MODEL INSTRUCTIONS. WE DON'T HAVE A REAL PROBLEM  
25 WITH THAT BUT WE WANTED TO RAISE IT.

1 THE COURT: LET ME SEE WHAT THE  
2 DIFFERENCE IS.

3 MR. FAZIOLI: THE STIPULATION LANGUAGE IS  
4 SLIGHTLY DIFFERENT.

5 MR. LUCEY: AND WE GATHERED YOUR HONOR  
6 THAT THE COURT HAD TAKEN UPON ITSELF TO COMBINE A  
7 COUPLE OF MODEL INSTRUCTIONS TOGETHER.

8 THE COURT: I THINK I PUT THE STIPULATION  
9 IN TO CHANGE THE MODEL, I HAD THE STIPULATION THAT  
10 YOU ACTUALLY HAD ONE READ TO THEM.

11 WHAT'S THE PROBLEM WITH SIX?

12 MR. FAZIOLI: I DON'T THINK IT'S A  
13 PROBLEM, I THINK IT'S SLIGHTLY DIFFERENT THAN THE  
14 MODEL INSTRUCTION.

15 THE COURT: I THINK THE LANGUAGE ABOUT  
16 CONSIDERING THE LAWYER'S QUESTIONS, I UNDERSTAND  
17 THE ANSWERS MAY BE AN ADDITION.

18 MR. FAZIOLI: WE DON'T HAVE AN OBJECTION  
19 TO THAT.

20 EIGHT, UNDER CREDIBILITY OF WITNESSES, WE  
21 DID NOTICE THE LAST SENTENCE IN EIGHT WAS IT'S  
22 IMPORTANT HOW BELIEVABLE THE WITNESSES WERE AND HOW  
23 MUCH WEIGHT YOU THINK THEIR TESTIMONY DESERVES.

24 THAT APPEARS TO BE ADDED TO THE MODEL  
25 INSTRUCTION AND WE WANTED TO INQUIRE ABOUT THE

1 COURT'S THOUGHT PROCESS BEHIND ADDING THAT  
2 SENTENCE.

3 THE COURT: WHAT DO YOU THINK IS ADDED?

4 MR. LUCEY: THE VERY LAST SENTENCE,  
5 YOUR HONOR.

6 THE COURT: AND WHAT MODEL INSTRUCTION AM  
7 I LOOKING AT?

8 MR. FAZIOLI: WELL, OUR MISTAKE,  
9 YOUR HONOR.

10 MR. FONG: I THINK THAT SENTENCE IS FINE  
11 WITH THE DEFENSE, YOUR HONOR. I THINK THERE'S  
12 ACTUALLY A SLIGHT VARIATION BETWEEN THE BOOK  
13 VERSION OF THE MODEL INSTRUCTION AND THE ON LINE  
14 VERSION WHICH IS PROBABLY WHY WE'RE SEEING  
15 SLIGHTLY, SOME SLIGHT DIFFERENCES.

16 THE COURT: I WILL CHECK AND SEE IF  
17 THAT'S -- I MEAN, THERE MAY HAVE BEEN SOME MINOR  
18 MODIFICATIONS AFTER THE BOOKLET WAS FORMED OR  
19 PUBLISHED.

20 MR. FONG: AND FROM THE DEFENSE'S  
21 STANDPOINT, THAT LAST SENTENCE WE BELIEVE IS  
22 APPROPRIATE.

23 MR. FAZIOLI: ALL RIGHT. THE NEXT ONE  
24 WOULD BE JURY INSTRUCTION TEN, THE OTHER WRONGS OR  
25 ACTS OF THE DEFENDANT.



1 WE WOULD PROBABLY HAVE TWO POINTS.  
2 FIRST, GENERALLY TO THE EXTENT THAT THE COURT HAD  
3 RULED THAT THE EVIDENCE RELATED TO MS. DOONG AND  
4 HER SISTER WAS INEXTRICABLY INTERTWINED WITH THE  
5 CHARGED OFFENSE CONDUCT, WE ARE NOT SURE IT'S  
6 NECESSARY TO HAVE A SPECIFIC INSTRUCTION ADDRESSING  
7 THIS PARTICULAR POINT.

8 MR. LUCEY: AND TO THAT POINT,  
9 YOUR HONOR, FOR, WE DID A LITTLE BIT OF RESEARCH ON  
10 THIS LAST NIGHT. WE DID DULLY FIND A CASE, IT'S A  
11 2008-CASE THAT WAS NOT SELECTED FOR PUBLICATION BUT  
12 IT APPEARS TO BE ON POINT FROM OUR CIRCUIT AND  
13 DISTRICT. IT'S A CASE INVOLVING JUDGE CONTI UP IN  
14 SAN FRANCISCO.

15 UNITED STATES V. HATTEBERG. 295 FED  
16 APPENDIX 249. THE WESTLAW CITE IS 208 WESTLAW  
17 4482996. I HAVE A COPY TO HAND UP TO THE COURT.

18 THE CASE INVOLVES WIRE FRAUD YOUR HONOR.  
19 AND THE ISSUE IN THAT CASE IS AFTER THE COURT RULED  
20 CERTAIN EVIDENCE WAS INEXTRICABLY INTERTWINED,  
21 WHETHER OR NOT A MORE DETAILED INSTRUCTION WAS  
22 NEEDED. AND THE NINTH CIRCUIT OPINES, AGREES WITH  
23 JUDGE CONTI THAT A MORE PARTICULAR LIMITING  
24 INSTRUCTION WAS NOT REQUIRED UNDER RULE 105 SINCE  
25 THE COURT RULED THE MATTERS AT ISSUE WERE NOT IN

1 FACT 404(B) BUT WERE INEXTRICABLY INTERTWINED IN  
2 THE CHARGES IN CHIEF.

3 THE COURT: I DID NOT LOOK AT THAT CASE  
4 BUT I THOUGHT ABOUT IT AND MY THINKING WAS AS  
5 FOLLOWS: THAT I DO THINK THE TESTIMONY IS  
6 INEXTRICABLY INTERTWINED BUT I ALSO THOUGHT THE  
7 PURPOSES FOR WHICH THE TESTIMONY WAS RELEVANT WAS  
8 BASICALLY TO PROVE OR ADD TO THE PROOF THAT THE  
9 GOVERNMENT HAD AS TO THERE BEING A FRAUDULENT  
10 SCHEME. AND I DIDN'T SEE ANYTHING THAT WOULD BE  
11 RELEVANT EXCEPT FOR THAT. AND THAT'S WHY YOU  
12 OFFERED THE TESTIMONY.

13 SO --

14 MR. LUCEY: IS YOUR CONCERN, YOUR HONOR,  
15 THAT THERE WASN'T TESTIMONY FROM MS. DOONG IN  
16 REGARD TO DIRECT CONNECTIONS TO MR. LIN OR  
17 MR. VERDIELL'S WIRES?

18 THE COURT: NO, NOT REALLY THAT. I GUESS  
19 I WAS IN PART THINKING THAT I THINK IT'S  
20 INEXTRICABLY INTERTWINED BUT IF SOMEBODY ELSE  
21 LOOKING AT IT SAID IT WASN'T, IT STILL WOULD BE  
22 VERY RELEVANT TO MY VIEW TOWARDS THE ISSUE OF  
23 WHETHER THERE WAS A FRAUDULENT SCHEME AS TO MR. --  
24 WHO IS ALLEGED IN MOTIVE OR PLANNING.

25 MR. FAZIOLI: YOUR HONOR, IF THE COURT IS

1 INCLINED TO PROPOSE SOME INSTRUCTION, WE HAD AN  
2 ALTERNATIVE FORMULATION OF THE INSTRUCTION.

3 THE COURT: WHAT IS THAT?

4 MR. FAZIOLI: I HAVE SOME NOTES HERE SO I  
5 WILL READ IT.

6 YOU HAVE HEARD EVIDENCE THAT MR. HU  
7 OBTAINED MONEY FROM GRACE DOONG -- YOU HAVE HEARD  
8 EVIDENCE THAT MR. HU OBTAINED MONEY FROM GRACE  
9 DOONG AND HER SISTER IN CONNECTION WITH INVESTMENTS  
10 THAT GRACE DOONG MADE ON BEHALF OF HER SISTER IN  
11 THE ASENQUA BETA FUND.

12 YOU ALSO HEARD EVIDENCE THAT MR. HU LATER  
13 REPRESENTED THAT THE MONEYS FROM HER SISTER'S  
14 INVESTMENT WERE TRANSFERRED TO THE FIRESIDE LS  
15 FUND. YOU ALSO HEARD MR. HU OBTAINED MONEY FROM  
16 GRACE DOONG IN CONNECTION WITH HER OWN INVESTMENT  
17 IN THE AQC FUND.

18 MR. HU IS NOT SPECIFICALLY CHARGED IN  
19 THIS CASE WITH WIRE FRAUD WITH RESPECT TO THE WIRES  
20 MADE BY MS. DOONG AND HER SISTER. YOU MAY CONSIDER  
21 THE TESTIMONY OF MS. DOONG REGARDING THE  
22 REPRESENTATIONS MADE TO HER AND HER SISTER'S  
23 INVESTMENTS ONLY FOR THE LIGHT IT SHEDS IF ANY, ON  
24 THE QUESTION OF WHETHER MR. HU WAS ENGAGED IN A  
25 FRAUDULENT SCHEME TO DEFRAUD AS WELL AS ALSO FOR

1 HIS INTENT, MOTIVE OR PLAN AT THE TIME HE OBTAINED  
2 THE MONEY HE IS CHARGED WITH HAVING OBTAINED FROM  
3 BOB LIN AND MARK VERDIELL.

4 MR. FONG: YOUR HONOR, THE DEFENSE HAS  
5 OFFERED ITS OWN VERSION OF INSTRUCTION TEN WHICH WE  
6 DO AGREE IS ESSENTIAL, INSTRUCTION NUMBER TEN. THE  
7 DEFENSE'S POSITION IS THAT WITH THE WRITTEN CHANGES  
8 THAT WE PROPOSED, WE THINK THE INSTRUCTION IS FINE.  
9 AND I BELIEVE THAT IN PRINCIPLE THE PARTIES ARE IN  
10 AGREEMENT AS TO TAKING OUT THE PHRASE, BY FALSE  
11 PRETENSE, IN THE FIRST SENTENCE OF INSTRUCTION  
12 NUMBER TEN.

13 BUT OTHERWISE THE DEFENSE'S POSITION IS  
14 THAT WHAT WE ARE PROPOSING WOULD BE ACCEPTABLE,  
15 WHICH ACTUALLY, SOMEHOW PROBABLY GOES WITHOUT  
16 SAYING.

17 MR. FAZIOLI: I UNDERSTAND THE ARGUMENT  
18 THAT THE DEFENDANT IS NOT -- HE'S CHARGED WITH WIRE  
19 FRAUD, HE'S NOT CHARGED SPECIFICALLY WITH THE WIRES  
20 MADE BY MS. DOONG AND HER SISTER. I UNDERSTAND  
21 THAT ARGUMENT.

22 MR. LUCEY: AND YOUR HONOR, WE DO THINK  
23 THOUGH, IT'S IMPORTANT, IF WE ARE GOING TO BE  
24 CALLING OUT IN THE INSTRUCTION THE PARTICULAR  
25 WITNESS, MS. DOONG AND THE INVESTMENT THAT, IT DOES

1 SPECIFY THAT THERE WAS, THAT THE ASENQUA BETA, AT  
2 LEAST EVIDENCE WAS GIVEN TO THE RECORD BY MS. DOONG  
3 ABOUT THAT BEING REPRESENTED THAT WAS BEING  
4 TRANSFERRED TO FIRESIDE AS WELL AS HER ADDITIONAL  
5 INVESTMENT HERSELF IN THE AQC FUND.

6 MR. FONG: IT SEEMS TO ME, YOUR HONOR,  
7 ONE WAY TO ADDRESS THE GOVERNMENT'S CONCERN IS THE  
8 FIFTH, LINE FIVE, SIMPLY END THE SENTENCE AFTER THE  
9 WORD BEHALF, PERIOD. THEN TAKE OUT THE PHRASE, IN  
10 THE ASENQUA BETA FUND.

11 BECAUSE I THINK THAT WILL CONVEY TO THE  
12 JURORS BASED ON WHAT THEY HEARD IN COURT, THE ONLY  
13 THING IS WE DON'T HAVE TO CONFUSE THEM ABOUT AQC,  
14 ASENQUA BETA, AND FIRESIDE, SIMPLY SAY ON HER  
15 SISTER TO INVEST ON HER -- EXCUSE ME. BY HER  
16 SISTER TO INVEST ON HER BEHALF, PERIOD. AND THEN  
17 STRIKING OUT THE PHRASE, IN THE ASENQUA BETA FUND.

18 THE COURT: WE DO HAVE THE FACT THAT  
19 THERE WAS TESTIMONY THAT SHE INVESTED HERSELF --

20 MR. LUCEY: IN THE AQC, CORRECT.

21 MR. LUCEY: ON BEHALF OF HERSELF AS WELL  
22 AS ON BEHALF OF HER SISTER.

23 MR. FONG: SURE. I HAVE NO PROBLEM WITH  
24 THAT. ON BEHALF OF HERSELF AND ON BEHALF OF HER  
25 SISTER.

1           BUT WE MS. DOONG IT IS IMPORTANT TO  
2           CHANGE THE FIRST SENTENCE SO THAT IT READS.

3           THE COURT: I'M OKAY WITH THAT. I'M JUST  
4           LOOKING --

5           MR. FAZIOLI: I THINK IF THE COURT WERE  
6           TO TAKE OUT THE REFERENCE ABOUT FALSE PRETEXT, IT  
7           WOULD BE CONFUSING TO ADD THE LANGUAGE ABOUT  
8           RELATED TO WHETHER OR NOT THAT THE DEFENDANT IS  
9           PROPOSING --

10          THE COURT: HOW ABOUT IF I JUST SAY,  
11          YOU'VE HEARD EVIDENCE RELATING TO INVESTMENT FUNDS  
12          MR. HU OBTAINED FROM GRACE DOONG AND HER SISTER?

13          MR. FAZIOLI: THAT'S FAIR, YOUR HONOR.

14          MR. FONG: THAT'S FINE, YOUR HONOR.

15          MR. FAZIOLI: YOUR HONOR, THE NEXT  
16          SECTION THAT --

17          THE COURT: ONE SECOND.

18          LET ME READ TO YOU WHAT I'VE GOT AND MAKE  
19          SURE IT'S ACCEPTABLE.

20          YOU HAVE HEARD EVIDENCE RELATING TO  
21          INVESTMENT FUNDS MR. HU OBTAINED FROM GRACE DOONG  
22          AND HER SISTER. MR. HU IS NOT CHARGED IN THIS CASE  
23          WITH WIRE FRAUD WITH RESPECT TO THE INVESTMENTS  
24          MADE BY MS. DOONG AND HER SISTER. YOU MAY CONSIDER  
25          THE TESTIMONY OF MS. DOONG REGARDING THE

1 REPRESENTATIONS MADE TO HER AND HER SISTER'S  
2 INVESTMENT ONLY FOR THE LIGHT IT SHEDS ON ANY  
3 QUESTION, ON THE QUESTION OF WHETHER MR. HU WAS  
4 ENGAGED IN A FRAUDULENT SCHEME AND ON HIS INTENT,  
5 MOTIVE OR PLAN AT THE TIME HE OBTAINED THE MONEY  
6 HE'S CHARGED WITH HAVING OBTAINED FROM BOB LIN AND  
7 MARK VERDIELL

8 MR. FONG: THAT'S FINE FROM THE DEFENSE'S  
9 STANDPOINT. IF I MAY ASK THE COURT TO ADD BACK THE  
10 PHRASE, AFTER FOR THE LIGHT IT SHEDS, IF ANY.

11 THE COURT: BUT I DIDN'T READ, IF ANY.

12 MR. FONG: THAT'S FINE, YOUR HONOR.

13 MR. FAZIOLI: YOUR HONOR, REGARDING THE  
14 SENTENCE, MR. HU IS NOT CHARGED IN THIS CASE WITH  
15 WIRE FRAUD. I THINK TECHNICALLY THERE'S REFERENCES  
16 TO INVESTORS GENERALLY BEYOND MR. LIN AND  
17 MR. VERDIELL. SO WE MIGHT PROPOSE, MR. HU IS NOT  
18 SPECIFICALLY CHARGED IN THIS CASE WITH WIRE FRAUD  
19 WITH RESPECT TO THE WIRES MADE BY MS. DOONG AND HER  
20 SISTER, AS OPPOSED TO THE INVESTMENTS MADE.

21 BECAUSE IT IS TRUE THAT WE DID NOT  
22 INCLUDE THE SPECIFIC WIRING OF MONEY THAT MS. DOONG  
23 AND HER SISTER DID, BUT I DON'T -- I THINK WITHIN  
24 THE AUSPICES OF THE SCHEME TO DEFRAUD, THERE'S AN  
25 ARGUMENT TO BE MADE THAT MR. HU WAS CHARGED WITH --

1        THAT THEY WERE PART OF THE SCHEME TO DEFRAUD FOR  
2        WHICH HE WAS CHARGED ALTHOUGH THE SPECIFIC WIRES  
3        WERE NOT CHARGED.

4                MR. FONG:    YOUR HONOR, GIVEN THE  
5        REFERENCES THAT MR. HU IS NOT CHARGED IN THIS CASE  
6        WITH WIRE FRAUD, AS OPPOSED TO THE LANGUAGE, ANY  
7        LANGUAGE ABOUT SCHEME TO DEFRAUD.

8                I THINK THE SENTENCE IS PERFECTLY FINE  
9        THE WAY IT IS.

10               MR. FAZIOLI:    ALTERNATIVELY, WE COULD  
11        SAY --

12               THE COURT:    HOW ABOUT IF WE JUST SAID  
13        MR. HU IS NOT CHARGED IN THIS CASE WITH WIRE FRAUD  
14        WITH RESPECT TO THE WIRE TRANSFERS OF MONEY MADE BY  
15        MS. DOONG AND HER SISTER.

16               MR. FAZIOLI:    THAT WOULD BE ACCEPTABLE TO  
17        THE GOVERNMENT.

18               MR. FONG:    YOUR HONOR, THE ONLY PROBLEM I  
19        HAVE IS THAT, THAT LEAVES OPEN THE POSSIBLE  
20        INTERPRETATION BY THE JURORS THAT THEY MAY REMEMBER  
21        OR THEY MAY REMEMBER THAT INVESTMENTS WERE MADE BY  
22        MS. DOONG BUT THEY MAY NOT REMEMBER NECESSARILY  
23        THAT IT WAS BY WIRE TRANSFER OR NOT.

24               I THINK THE ORIGINAL LANGUAGE ABOUT, WITH  
25        RESPECT TO THE INVESTMENTS MADE BY MS. DOONG, WOULD



1 BE FROM THE DEFENSE'S STANDPOINT, MUCH MORE -- IT  
2 WOULD BE MUCH MORE INCLUSIVE MAKING SURE THAT THE  
3 JURORS DO NOT FIND MR. HU GUILTY BASED ON ANY  
4 INVESTMENT MADE BY MS. DOONG.

5 THE COURT: WE COULD SAY WIRE FRAUD WITH  
6 RESPECT TO THE MONEY TRANSFERS. THE WIRE TRANSFERS  
7 OF MONEY?

8 MR. FONG: THAT WOULD BE FINE WITH THE  
9 DEFENSE.

10 MR. FAZIOLI: AND I THINK GIVEN THE  
11 NATURE OF -- ANTICIPATE THE VERDICT FORM. I DON'T  
12 THINK THERE'S REAL RISK OF CONFUSION IN THAT  
13 REGARD.

14 THE COURT: DO YOU HAVE ANY PROBLEM WITH  
15 WIRE TRANSFERS OF MONEY.

16 MR. FAZIOLI: THAT'S FINE.

17 THE NEXT SENTENCE, YOU MAY CONSIDER THE  
18 FAMILIAR OF MS. DOONG REGARDING REPRESENTATIONS  
19 MADE TO HER AND --

20 THE COURT: THAT'S A LITTLE BIT AWKWARD.

21 WHY DON'T WE JUST SAY, YOU MAY CONSIDER  
22 THE TESTIMONY OF MS. DOONG REGARDING THE  
23 REPRESENTATIONS MADE TO HER ONLY FOR THE LIGHT IT  
24 SHEDS

25 MR. FONG: I THINK THAT'S APPROPRIATE,

1 YOUR HONOR, BECAUSE HER SISTER WAS CLEARLY NOT THE  
2 RECIPIENT OF ANY ALLEGED REPRESENTATIONS.

3 MR. LUCEY: EXCEPT IN WRITING. SHE  
4 DIDN'T OFFER TESTIMONY HERE BUT IT WAS INDICATED  
5 THE SISTER, SHE WAS LOOKING AT THE DOCUMENTS,  
6 MS. DOONG LOOKED OVER THE DOCUMENTS FOR THE BENEFIT  
7 OF HER SISTER.

8 MR. FAZIOLI: IF THAT'S THE CASE, WE  
9 MIGHT JUST MAYBE PERHAPS THE REPRESENTATION MADE TO  
10 HER AND HER SISTER, TO BE CLEAR IF THAT'S THE  
11 INSTRUCTION IT APPLIES TO THOSE.

12 MR. LUCEY: SO IT WOULD INCLUDE  
13 REPRESENTATIONS MADE TO MS. DOONG IN CONNECTION  
14 WITH HER OWN AND HER SISTER'S INVESTMENT.

15 THE COURT: ANY PROBLEM WITH MADE TO HER  
16 AND HER SISTER?

17 MR. FONG: IT INJECTS A PHRASING THERE,  
18 YOUR HONOR, THAT I DO NOT BELIEVE THE EVIDENCE  
19 COVERS. I DO NOT RECALL THE EVIDENCE COVERING THE  
20 FACT THAT -- WELL, FIRST OF ALL MS. DOONG WOULD NOT  
21 BE IN A POSITION TO TESTIFY AS TO WHAT HER SISTER  
22 HEARD OR READ.

23 SO I THINK, AND IT WAS CLEAR SHE WAS  
24 ACTING, THE THING SHE WAS DOING WERE ON HER OWN  
25 BEHALF AND HER SISTER'S BEHALF. SO I THINK IF SHE

1 WAS -- IF YOU WILL, THE RECIPIENT OF ANY --

2 THE COURT: I THINK IF WE JUST LEAVE IT,  
3 REPRESENTATIONS MADE TO HER, IT'S CLEAR ENOUGH.

4 MR. FONG: THANK YOU.

5 MR. FAZIOLI: OKAY. MOVING ON TO JURY  
6 INSTRUCTION 13. WE DISCUSSED THE TABLE AND WE WILL  
7 E-MAIL THE COURT THE TABLE WE HAVE IN OUR TRIAL  
8 STIPULATION BETWEEN THE PARTIES.

9 THE GOVERNMENT IS GENERALLY ACCEPTS THE  
10 CHARGES AGAINST DEFENDANT PROPOSED BY THE COURT. I  
11 THINK IT MIGHT BE SLIGHTLY CLEARER IF INSTEAD OF AT  
12 THE BOTTOM IT SAID, THE FOLLOWING TRANSFERS OF  
13 FUNDS, IT INDICATED THE FOLLOWING WIRES. AND THEN  
14 SORT OF SEQUENCE INTO THE WIRES THAT ARE LISTED IN  
15 THE INDICTMENT

16 MR. LUCEY: WIRES OR WIRE COMMUNICATION.

17 THE COURT: SO JUST TAKE FOLLOWING  
18 WIRES --

19 MR. FAZIOLI: FOLLOWING WIRES OR WIRE  
20 COMMUNICATIONS. THEN SUBSEQUENTLY HAVE THE TABLE  
21 MODIFIED TO REFLECT THE TRIAL STIPULATION NUMBER  
22 TWO.

23 THE COURT: I DON'T SEE ANY SUBSTANTIVE  
24 DIFFERENCE.

25 MR. FONG: I DON'T HAVE AN OBJECTION TO

1        THAT PROPOSED CHANGE, YOUR HONOR.

2                I DID PROPOSE A COUPLE OF ADDITIONAL  
3        SENTENCES FOR INSTRUCTION 13. IT'S SET FORTH ON  
4        PAGE FOUR OF MY PLEADING. THE ADDITIONS ARE  
5        HIGHLIGHTED AND IN BRACKETS. THE PROPOSED  
6        ADDITIONS, I SHOULD SAY.

7                MR. FAZIOLI: AND THE GOVERNMENT WOULD  
8        RESPECTFULLY DISAGREE WITH THESE SUGGESTIONS.

9                AS TO THE FIRST ONE, THERE IS LANGUAGE  
10       SOMEWHAT LIKE THAT, SLIGHTLY DIFFERENT IN THE  
11       INDICTMENT, BUT I'M NOT REALLY SURE IT'S NECESSARY  
12       TO ADD PURPOSES OF THE SCHEME TO DEFRAUD.

13               AND I THINK THE PRIOR SENTENCE GIVES A  
14       SUFFICIENT INTRODUCTION TO THE FRAUD. AND THE  
15       SCHEME IN THE INDICTMENT GOES THROUGH THE  
16       PARAGRAPHS AND CONTINUES ON -- I THINK JUST  
17       INCLUDING THAT PARTICULAR --

18               THE COURT: I AGREE. I DON'T THINK IT'S  
19       NECESSARY. I THINK IT'S ADEQUATELY COVERED  
20       ELSEWHERE.

21               HOW ABOUT THE LAST SENTENCE?

22               MR. FAZIOLI: THE LAST SENTENCE I THINK  
23       THE -- WITH THE PROPOSED CHANGE THAT THE LANGUAGE  
24       OF THE COURT, HAVE IT TO REFLECT WIRES OR WIRE  
25       COMMUNICATIONS AT THE END AND THEN THE TABLE, I

1 THINK WOULD CONVEY MORE EFFICIENTLY A NOTION THAT  
2 THESE WERE THE PARTICULAR WIRES THAT THE PARTIES  
3 WERE LOOKING AT. SO WE DON'T REALLY THINK IT'S  
4 NECESSARY TO INCLUDE THE PROPOSED --

5 MR. LUCEY: AND THE TRIAL STIPULATION TWO  
6 LANGUAGE THAT WE ARE PROPOSING ADDING I THINK EVEN  
7 HAS AGREED ON, REFERENCES AS TO EACH WIRE THE  
8 PERSON INVOLVED, MR. LIN OR MR. VERDIELL AS  
9 APPROPRIATE.

10 MR. FAZIOLI: IT WOULD SAY, AN INTERSTATE  
11 WIRE TRANSFER OF HUNDRED THOUSAND DOLLARS SENT BY  
12 OR ON THE BEHALF OF MR. LIN.

13 MR. FONG: YOUR HONOR, I BELIEVE THAT --  
14 THE DEFENSE'S POSITION IS THE TWO PROPOSED  
15 ADDITIONS ARE NECESSARY BECAUSE THE GOVERNMENT  
16 CLEARLY DELIBERATELY CHOSE TO INDICT THIS CASE AND  
17 TO PRESENT AS EVIDENCE IN THIS CASE IN A PARTICULAR  
18 MANNER.

19 THE GOVERNMENT HAS MADE RELIANCE AND  
20 INDUCEMENT AN ESSENTIAL PART OF ITS CASE.

21 THE JURORS ARE ENTITLED TO SEE WHAT THE  
22 GOVERNMENT HAS CHARGED AND THEN WHAT THE -- AND  
23 THEN WHETHER OR NOT THE PROOF CONFORMS WITH THE  
24 CHARGES.

25 AND I THINK IT WOULD BE VERY CONFUSING TO

1 THE JURORS NOT TO -- TO NOW BE LEFT WITH THINKING  
2 THAT WHAT THIS CASE IS ABOUT IS NOT THE FACT THAT  
3 THE GOVERNMENT CHOSE TO MAKE RELIANCE AN ESSENTIAL  
4 PART OF ITS FACTUAL PRESENTATION.

5 MR. FAZIOLI: I -- RESPECTFULLY, I THINK  
6 THE PROPOSED CHARGES OR THE PROPOSED LANGUAGE THE  
7 COURT INCLUDED IS SUFFICIENT. IT DOES INDICATE  
8 THAT THE DEFENDANT DEVISED A SCHEME TO DEFRAUD THEN  
9 CAUSED TO BE TRANSMITTED IN INTERSTATE OR FOREIGN  
10 COMMERCE CERTAIN WIRE COMMUNICATIONS OR WIRES.  
11 THAT'S WHAT WAS PUT FORWARD IN THE INDICTMENT, THE  
12 PARTIES STIPULATED TO IT.

13 THE COURT WILL -- THE JURY WILL ALSO BE  
14 INSTRUCTED ON THE VARIOUS ELEMENTS OF WIRE FRAUD  
15 WHICH INCLUDE VARIOUS SUBSTANTIVE ELEMENTS WHICH I  
16 THINK LAY OUT IN THE FORM THE NECESSARY  
17 REQUIREMENTS FOR THE GOVERNMENT TO MEET ITS BURDEN  
18 OF PROVING THAT THE DEFENDANT IS GUILTY OF WIRE  
19 FRAUD.

20 MR. FONG: I SEE A REAL DANGER OF A  
21 VARIANCE, YOUR HONOR, IF THE GOVERNMENT HAVING  
22 CHARGED A CASE IN A PARTICULAR WAY AND THEN  
23 PRESENTED ITS EVIDENCE IN A PARTICULAR WAY, NOW AT  
24 THE STAGE OF JURY INSTRUCTION AND CLOSING ARGUMENTS  
25 SORT OF LEAVE OUT A KEY PART OF WHAT THIS CASE IS

1 ABOUT.

2 MR. FAZIOLI: I DON'T UNDERSTAND WHAT THE  
3 KEY PART THE GOVERNMENT IS LEAVING OUT.

4 THE COURT: WELL, I THINK WHAT HE'S  
5 SAYING IS THAT YOU TURNED THIS INTO A CASE THAT  
6 INVOLVES A REQUIREMENT THAT -- TO INVESTORS,  
7 JUSTIFIABLY RELIED ON THE REPRESENTATIONS THAT WERE  
8 MADE. THAT'S WHAT I THINK HE'S BASICALLY SAYING.

9 I FRANKLY DON'T SEE IT THAT WAY IN THE  
10 SENSE THAT I DO THINK THAT THERE WAS EVIDENCE OF  
11 WHY THE INVESTMENTS WERE MADE AND WHAT DIFFERENCE  
12 SOME OF THE REPRESENTATIONS MADE, BUT I'M NOT SURE  
13 THAT MEANS THAT THE PROOF HAS TO BE THAT THE  
14 GOVERNMENT -- THAT THE DEFENDANTS JUSTIFIABLY  
15 RELIED ON THE REPRESENTATIONS. I THINK THE ISSUE  
16 IS WHETHER OR NOT THE REPRESENTATIONS WERE MATERIAL  
17 AND THAT'S AN OBJECTIVE STANDARD ON WHICH PERHAPS  
18 WHAT AN INDIVIDUAL DID OR DID NOT DO MIGHT HAVE  
19 SOME TENDENCY TO PROVE. BUT I DON'T THINK IT MAKES  
20 IT AN ELEMENT OF THE OFFENSE.

21 MR. FONG: AND YOUR HONOR, TO FOLLOW UP  
22 ON THAT, THE GOVERNMENT THROUGHOUT THIS ENTIRE CASE  
23 REPEATEDLY PRESENTED EVIDENCE THAT MR. VERDIELL  
24 READ REPRESENTATION X AND THAT HE WOULD NOT HAVE  
25 MADE THE INVESTMENT BUT FOR THAT REPRESENTATION.

1           CLEARLY, THE GOVERNMENT HAS MADE A  
2           FACTUAL ISSUE OUT OF RELIANCE IN THIS CASE. AND  
3           EVEN THOUGH OF COURSE RELIANCE MAY NOT BE A  
4           TECHNICAL ELEMENT, BUT THE GOVERNMENT HAS MADE  
5           RELIANCE EQUAL TO MATERIALITY IN THIS PARTICULAR  
6           CASE.

7           I DON'T THINK THEY CAN NOW AT THIS STAGE  
8           SAY THAT RELIANCE IS NOT A FACTOR. THEY HAVE MADE  
9           THAT AN ESSENTIAL PART OF THEIR CASE AND IT IS --  
10          IT DOES REFLECT ON WHAT IS MATERIAL AND WHAT IS  
11          NOT. BECAUSE WE CANNOT DIVORCE, SAY,  
12          MR. VERDIELL'S REPEATED STATEMENTS THAT YES, I READ  
13          A, B, C, D, E, F, MISREPRESENTATIONS AND STATEMENTS  
14          AND THEY WERE FALSE AND I RELIED ON THESE FALSE  
15          STATEMENTS IN MAKING MY DECISION TO INVEST IN  
16          FIRESIDE.

17          SO GIVEN THE STATE OF THE EVIDENCE AND  
18          GIVEN HOW THE GOVERNMENT DELIBERATELY CHOSE TO  
19          INDICT THIS PARTICULAR CASE, BECAUSE THE PROPOSED  
20          LANGUAGE THAT I HAVE IN HERE, YOUR HONOR, CAME  
21          DIRECTLY OUT OF THE INDICTMENT. AND I'M HAPPY TO  
22          SHARE WITH THE COURT THE SPECIFIC PAGE AND LINE OF  
23          THE INDICTMENT WHERE I LIFTED THAT LANGUAGE.

24          I DID NOT MAKE UP THAT LANGUAGE. THE  
25          LANGUAGE CAME DIRECTLY FROM THE INDICTMENT.



1 MR. FAZIOLI: WE RESPECTFULLY DISAGREE  
2 WITH THE NOTION THAT THERE'S AN ADDITIONAL RELIANCE  
3 ELEMENT TO THE WIRE FRAUD OFFENSE BEYOND THE  
4 MATERIALITY REQUIREMENT.

5 MR. FONG: AND I'M NOT ARGUING FOR AN  
6 ADDITIONAL ELEMENT. I'M SAYING AS A FACTUAL  
7 MATTER, YOUR HONOR, THE GOVERNMENT HAS MADE THE  
8 FACT OF WHETHER OR NOT MR. VERDIELL HAD, FOR  
9 EXAMPLE, RELIED ON A PARTICULAR REPRESENTATION IN  
10 DOING WHAT HE DID.

11 THE GOVERNMENT HAS MADE THAT AN ESSENTIAL  
12 PART OF THIS CASE. I WOULD SAY A GOOD 50 PERCENT  
13 OF THIS CASE IS ABOUT MR. LIN AND MR. VERDIELL  
14 TESTIFYING, YES, I READ THIS STATEMENT. YES, THIS  
15 STATEMENT WAS MADE TO ME, AND BECAUSE OF THIS  
16 PARTICULAR STATEMENT I MADE THE DECISION TO INVEST.  
17 IT IS AN ESSENTIAL PART OF THE FACTUAL DISPUTE IN  
18 THIS CASE. WE CAN NOT GET AWAY FROM IT.

19 MR. FAZIOLI: I RESPECTFULLY DISAGREE. I  
20 THINK THE COURT'S JURY INSTRUCTION LAYING OUT  
21 CHARGES AGAINST THE DEFENDANT IS ACCURATE. WE ARE  
22 CHARGING, HE'S CHARGED WITH SEVEN COUNTS OF WIRE  
23 FRAUD. THE DEFENDANT KNOWINGLY AND INTENTIONALLY  
24 DEVISED A SCHEME TO DEFRAUD WHICH CAUSED WIRE  
25 TRANSFERS AND WIRE COMMUNICATIONS. THAT'S WHAT WAS

1 PUT FORWARD IN THE INDICTMENT. AND WE THINK THAT  
2 THAT'S -- THAT COUPLED WITH THE WIRE FRAUD MODEL  
3 INSTRUCTION IS APPROPRIATE, IT'S THE LAW, AND LAYS  
4 OUT WHAT THE CHARGES ARE AGAINST THE DEFENDANT AND  
5 WHAT THE ELEMENTS ARE AGAINST THE DEFENDANT.

6 THE COURT: OKAY. LET'S PASS THAT FOR A  
7 MOMENT BECAUSE THERE'S ONE OTHER INSTRUCTION THAT  
8 PERHAPS IS RELATED TO THAT.

9 SO WHAT'S YOUR NEXT ISSUE, IF YOU HAVE  
10 ONE?

11 MR. FAZIOLI: JURY INSTRUCTION NUMBER 14,  
12 WE HAD A COUPLE OF COMMENTS.

13 THE -- IT SAYS SCHEME TO DEFRAUD OR  
14 OBTAIN MONEY OR PROPERTY BY FALSE PROMISES.

15 TO THE EXTENT THE COURT IS USING THIS  
16 LANGUAGE OF FALSE OR FRAUDULENT PRETENSES,  
17 REPRESENTATIONS OR PROMISES, WE THOUGHT IF THAT WAS  
18 GOING TO BE IN THE TEXT THEN IT PERHAPS SHOULD BE  
19 IN THE HEADER AS WELL. SO THAT WAS A PROPOSED EDIT  
20 TO THE TITLE OF THIS JURY INSTRUCTION NUMBER 14.

21 THE COURT: ALL RIGHT.

22 MR. FAZIOLI: AND PARAGRAPH, THE ONE THAT  
23 SAYS, FIRST WITH ALL OF YOU AGREEING ON AT LEAST  
24 ONE PARTICULAR -- IT SAYS FRAUDULENT AND WE THOUGHT  
25 THAT SHOULD READ FALSE OR FRAUDULENT, TO TRACK THAT

1 LANGUAGE EARLIER IN THE SENTENCE.

2 THE COURT: I THINK YOU ARE BEING REALLY  
3 PICKY. I TRIED TO BE CONSISTENT WITH USING -- I'M  
4 NOT SURE WHAT IN THE FIRST SENTENCE, IT SAYS FIRST  
5 THE DEFENDANT KNOWINGLY DEvised A SCHEME,  
6 ET CETERA.

7 WHAT, BY MEANS OF FALSE SAYS THAT  
8 WOULDN'T BE COVERED BY MEANS OF FRAUDULENT. IN  
9 OTHER WORDS I'M NOT SURE THE OF FALSE OR NEEDS TO  
10 BE IN THERE. THEN IT WOULD BE CONSISTENT WITH THE  
11 REST OF THE INSTRUCTION.

12 DO YOU SEE ANY SIGNIFICANCE TO THAT?  
13 GIVEN THE OTHER WORDING IN THE SENTENCE, I DON'T  
14 THINK A JURY COULD EVER CONCLUDE THIS, BUT THE ONE  
15 PROBLEM I HAVE WITH JUST USING FALSE IS THAT  
16 SOMETHING COULD BE FALSE BUT NOT PART OF A  
17 FRAUDULENT SCHEME. YOU COULD MAKE A FALSE  
18 STATEMENT BUT NOT BE INTENDING TO DEFRAUD

19 MR. FAZIOLI: THAT SORT OF SEGWAYS INTO  
20 OUR NEXT POINT WHICH MIGHT BE A LITTLE MORE  
21 SUBSTANTIVE. WHICH IS THE MODEL OF OUR PROPOSED  
22 INSTRUCTION ADDED AN INDICATION THAT THE DEFENDANT  
23 KNEW THAT THE PRETENSES OR REPRESENTATIONS OR  
24 PROMISES WERE FALSE OR FRAUDULENT.

25 AND THAT ISN'T, THERE'S THE KNOWINGLY

1 ADVERB THAT'S IN THE FIRST PARAGRAPH BUT THE COURT  
2 MAY CONSIDER WHETHER IT WANTS TO ADD THAT, BREAK  
3 OUT THE FACT THAT THE DEFENDANT KNEW THAT THE  
4 PRETENSES, REPRESENTATIONS OR PROMISES WERE FALSE  
5 OR FRAUDULENT. WHETHER THAT SHOULD BE LISTED AS AN  
6 ELEMENT.

7 THE COURT: ARE YOU THINKING IT SHOULD  
8 BE?

9 MR. FAZIOLI: I THINK IT PROBABLY SHOULD  
10 BE.

11 MR. LUCEY: IT MIGHT BE GOOD TO TRACK  
12 THAT MODEL LANGUAGE.

13 MR. FAZIOLI: NOW, THERE ISN'T A MODEL  
14 INSTRUCTION I THINK FOR THE WIRE FRAUD.

15 MR. LUCEY: WE TOOK IT, YOUR HONOR, WE  
16 TOOK OUR INSTRUCTION FROM A COMBINATION OF 8.121  
17 8.124 IN THE 2010 ADDITION.

18 MR. FAZIOLI: I THINK IT DOES INDICATE  
19 THAT ONE OF THE ELEMENTS IS THAT THE DEFENDANT KNEW  
20 THAT THE STATEMENTS OR PRETENSES OR REPRESENTATIONS  
21 OR PROMISES WERE FALSE OR FRAUDULENT.

22 THE COURT: I DON'T SEE IT IN THE MODEL  
23 INSTRUCTION BUT I'M HAPPY TO ADD IT.

24 MR. FAZIOLI: WELL, IF THIS IS THE MODEL  
25 INSTRUCTION THEN IT'S CHANGED AND WE WILL NOT RAISE

1        THAT CONCERN.

2                THE COURT:    WHAT DID YOU MODEL IT AFTER?

3                MR. LUCEY:    WE HAD TAKEN IT AFTER, WE  
4        THOUGHT FROM THE MOST CURRENT INSTRUCTION,  
5        YOUR HONOR.    BUT PERHAPS THEY'VE MODIFIED IT AGAIN.

6                THE COURT:    DID THE ONE YOU HAVE, HAVE  
7        THE LANGUAGE ALL OF YOU AGREEING ON AT LEAST ONE  
8        PARTICULAR FRAUDULENT?

9                MR. LUCEY:    YES, IT DID.

10               THE COURT:    BECAUSE -- I DON'T THINK  
11        THAT'S IN THERE ANYMORE AND I PUT IT IN BECAUSE YOU  
12        ASKED FOR IT.

13               MR. FAZIOLI:   WE DO THINK -- WE AGREE  
14        THAT SHOULD BE IN THERE.    IF THE MODEL INSTRUCTIONS  
15        DO NOT INCLUDE THE -- IF THESE TRACK THE MODEL  
16        INSTRUCTIONS THEN OTHERWISE WE DON'T HAVE A PROBLEM  
17        WITH THAT.

18               THE OTHER EDIT THEN WOULD BE AFTER  
19        SUBSECTION --

20               THE COURT:    I DON'T KNOW HOW YOU ACT WITH  
21        THE INTENT TO DEFRAUD WITHOUT ACTING KNOWINGLY.

22               MR. LUCEY:    OH, NO, WE AGREE KNOWLEDGE  
23        SHOULD BE THERE YOUR HONOR.    IT'S JUST WHETHER IT  
24        COMES FROM A BREAK DOWN.

25               THE COURT:    IT SAYS KNOWINGLY DEvised A

1 SCHEME.

2 MR. FAZIOLI: I THINK THAT'S PROBABLY  
3 SUFFICIENT, ESPECIALLY IF IT TRACKS --

4 MR. LUCEY: IT WOULDN'T HURT TO HAVE THE  
5 KNOWLEDGE THING IN.

6 THE COURT: WHERE DID YOU WANT KNOWLEDGE  
7 IN?

8 MR. LUCEY: WE HAD ORIGINALLY PROPOSED AS  
9 THE SECOND ELEMENT YOUR HONOR, WOULD HAVE READ  
10 SECRETARY THE DEFENDANT KNEW THE PROMISES OR  
11 STATEMENTS WERE FALSE OR FRAUDULENT.

12 MR. FAZIOLI: AND I THINK IT SHOULD  
13 PROBABLY TRACK WHATEVER IF THE COURT IS GOING TO  
14 USE THE LANGUAGE OF PRETENSES, REPRESENTATIONS OR  
15 PROMISES, THEN PERHAPS IT SHOULD SAY THE DEFENDANT  
16 KNEW THAT THE PRETENSES, REPRESENTATIONS OR  
17 PROMISES WERE FALSE OR FRAUDULENT.

18 THE COURT: OKAY. THAT THE DEFENDANT  
19 KNEW THE PRETENSES, REPRESENTATIONS OR PROMISES  
20 WERE FALSE?

21 MR. FAZIOLI: OR FRAUDULENT.

22 MR. LUCEY: FALSE OR FRAUDULENT.

23 THE COURT: AGAIN, I'M HAVING TROUBLE  
24 SEEING WHERE YOU KNOW SOMETHING IS FALSE AND YOU  
25 REPRESENT IT, HOW CAN IT NOT BE FRAUDULENT? BUT

1 I'LL PUT IT IN.

2 OKAY.

3 MR. FAZIOLI: SO THEN THAT WOULD CHANGE  
4 THE PARAGRAPH NUMBERING, IF THAT WAS INCLUDED.

5 THE COURT: RIGHT.

6 MR. FAZIOLI: THEN AFTER THE WIRE  
7 SECTION, WE HAD PROPOSED THE DEFENDANT NEED NOT  
8 HAVE INTENDED THE USE OF WIRES NOR HAVE BEEN AWARE  
9 OF THE USE OF WIRES. I THINK THAT TRACKS THE LAW.

10 THE COURT: WHAT DID YOU WANT TO ADD?

11 MR. FAZIOLI: I'M SORRY?

12 THE COURT: TELL ME WHAT YOU WANTED TO  
13 ADD WHERE.

14 MR. FAZIOLI: FOURTH, THE DEFENDANT USED  
15 OR CAUSED TO BE USED IN INTERSTATE WIRES TO CARRY  
16 OUT AN ESSENTIAL PART OF THE SCHEME, AND WE WOULD  
17 PROPOSE TO ADD, THE DEFENDANT NEED NOT HAVE  
18 INTENDED THE USE OF WIRES NOR HAVE BEEN AWARE OF  
19 THE USE OF THE WIRES.

20 THE COURT: IS THAT THE LAW?

21 MR. FONG: IT'S -- YOUR HONOR, THAT'S NOT  
22 IN THE MODEL INSTRUCTION.

23 THE COURT: I KNOW IT'S NOT IN THE MODEL  
24 INSTRUCTION. I'M NOT COMFORTABLE WITHOUT SOME  
25 CITATION THAT THAT'S THE LAW.

1 MR. FAZIOLI: WE DO THINK IT'S THE LAW,  
2 BUT I THINK THAT IT'S NOT NECESSARY TO BE ADDED  
3 UNDER THE CIRCUMSTANCES.

4 MR. LUCEY: AND YOUR HONOR, I THINK IT'S  
5 IN THE COMMENT TO AT LEAST A VERSION OF THE RULES  
6 WE, THE INSTRUCTIONS WE WERE LOOKING TO. BUT AGAIN  
7 IF THE COURT IS NOT COMFORTABLE, WE'LL FOREGO IT.

8 MR. FAZIOLI: THEN DOWN AT THE BOTTOM OF  
9 THIS PARAGRAPH WHERE THERE'S A DISCUSSION OF  
10 MATERIALITY AND THE LAST LINE OF THE PAGE, THE LINE  
11 THAT SAYS, REPRESENTATION OR PROMISE, IT SAYS BE OF  
12 TYPE THEN PERHAPS THE WORD THE SHOULD BE ADDED.

13 THE COURT: OKAY.

14 MR. FAZIOLI: AND THAT'S IT FOR OUR  
15 COMMENTS AS TO JURY INSTRUCTION 14, ALTHOUGH I KNOW  
16 THE DEFENSE HAS SOME.

17 MR. FONG: YES, YOUR HONOR. AND I WILL  
18 LET THE COURT HAVE A MOMENT TO --

19 THE COURT: OKAY.

20 MR. FONG: YOUR HONOR, AS TO OUR PROPOSED  
21 CHANGES. THE FIRST ONE IS RELATIVELY MINOR ON LINE  
22 EIGHT OF THE COURT'S INSTRUCTION NUMBER 14.

23 WE WOULD PROPOSE THAT IT READ, BEYOND A  
24 REASONABLE DOUBT WITH RESPECT TO THAT PARTICULAR  
25 COUNT, AS OPPOSED TO THE COUNT.



1 THE COURT: I DON'T HAVE A PROBLEM WITH  
2 THAT.

3 MR. FONG: OKAY. THEN MOVING ON, THE  
4 SECOND PART ON LINES, AROUND LINES 23 THROUGH 25,  
5 WE WOULD PROPOSE ADDING THE LANGUAGE THAT CAME FROM  
6 U.S. V NEDER AS OPPOSED TO THE LANGUAGE OF A  
7 POTENTIAL INVESTOR DEPART WITH MONEY.

8 WE BELIEVE THE NEDER DECISION, OPINION,  
9 IS THE GOVERNING LAW AND THAT -- THAT LANGUAGE  
10 COMES DIRECTLY OUT OF NEDER.

11 THE COURT: I AGREE WITH THE LATTER PART  
12 THAT IT'S LANGUAGE DIRECTLY OUT OF NEDER. I DON'T  
13 SEE WHERE IT IS DIFFERENT THAN WHAT I HAVE AND THE  
14 PROBLEM I HAVE WITH USING THE NEDER LANGUAGE  
15 UNMODIFIED IS THAT WE ARE NOT DEALING WITH A  
16 DECISION MAKING BODY IN THIS CASE EXCEPT TO THE  
17 EXTENT YOU LOOK AT AN INDIVIDUAL AS A DECISION  
18 MAKING BODY.

19 AND NEDER, I THINK WE ARE TALKING ABOUT  
20 AN IRS AGENCY OR WE ARE DEALING WITH A BANK. BUT I  
21 THINK DECISION MAKING BODY IS CONFUSING IN THE  
22 CIRCUMSTANCES OF THIS CASE.

23 MR. FAZIOLI: WE WOULD AGREE WITH THAT,  
24 YOUR HONOR.

25 MR. FONG: HOW ABOUT THEN, YOUR HONOR,

1 THE DECISION OF THE, THE DECISION OF THE PERSON TO  
2 WHICH THE FRAUDULENT PRETENSE, REPRESENTATION OR  
3 PROMISE WAS MADE OR ADDRESSED. THAT SIMPLY  
4 SUBSTITUTE IN, I AGREE WITH THE COURT IT'S SLIGHTLY  
5 AWKWARD TO SAY, DECISION MAKING BODY. SO WE  
6 SUBSTITUTE IN THE PERSON OR INDIVIDUAL, HOW IS  
7 THAT?

8 MR. FAZIOLI: YOUR HONOR, WE WOULD HAVE A  
9 CONCERN WITH THAT AS THAT SEEMS TO BE A WAY OF  
10 SUBMITTING A SUBJECTIVE STANDARD AS OPPOSED TO AN  
11 OBJECTIVE STANDARD.

12 THE MODEL INSTRUCTION TALKS ABOUT NATURAL  
13 TENDENCY TO INFLUENCE OR CAPABLE OF INFLUENCING A  
14 PERSON TO PART WITH MONEY OR PROPERTY.

15 MR. FONG: BUT YOUR HONOR, THE REASON WHY  
16 NEDER IS IMPORTANT IS THAT IT DOESN'T -- IT DOES  
17 NOT LIMIT THE OBJECTIVE SPIRIT, IF YOU WILL,  
18 YOUR HONOR -- IT DOES NOT DEFINE THE OBJECTIVE  
19 SPIRIT AS EVERYBODY OUT THERE IN THE UNIVERSE. BUT  
20 RATHER, THE BODY OF INDIVIDUALS TO WHOM THESE  
21 INVESTMENTS WERE MADE SO THAT WITHIN THAT GROUP,  
22 THAT OBJECTIVE STANDARD MAY VERY WELL BE DIFFERENT  
23 FROM A MASSIVE MAILING THAT IS SENT OUT TO 200  
24 MILLION PEOPLE AROUND THE COUNTRY.

25 MR. FAZIOLI: WE WOULD SUBMIT YOUR

1 PROPOSED INSTRUCTION YOUR HONOR ADDRESSES THAT, THE  
2 LANGUAGE OF ANY PARTICULAR INVESTOR, WE THINK  
3 ADDRESSES THE CONCERN.

4 MR. LUCEY: I THINK IT WAS VERY CLEAR  
5 TESTIMONY ON THE RECORD FROM MULTIPLE WITNESSES  
6 REGARDING THE POTENTIAL INVESTORS IN THESE FUNDS AS  
7 TO WHAT THE NATURE OF THOSE POTENTIAL PEOPLE WERE  
8 GOING TO BE, AS OPPOSED TO THE ENTIRE UNIVERSE OF  
9 POTENTIAL INDIVIDUALS.

10 THE COURT: HOW ABOUT IF I MODIFIED IT TO  
11 READ, RATHER MATERIALITY ONLY REQUIRES THAT THE  
12 PRETENSE, REPRESENTATION OR PROMISE BE OF THE TYPE  
13 THAT WOULD HAVE A TENDENCY TO INFLUENCE OR BE  
14 CAPABLE OF INFLUENCING A POTENTIAL INVESTOR IN THE  
15 TYPE OF FUND INVOLVED TO PART WITH MONEY.

16 MR. FONG: MAY I TROUBLE THE COURT TO  
17 READ THAT AGAIN. I APOLOGIZE, YOUR HONOR. I GOT  
18 MOST OF IT BUT I JUST WANT TO BE SURE. THANK YOU.

19 THE COURT: RATHER MATERIALITY ONLY  
20 REQUIRES THAT THE PRETENSE, REPRESENTATION OR  
21 PROMISE BE OF THE TYPE THAT WOULD HAVE A TENDENCY  
22 TO INFLUENCE OR BE CAPABLE OF INFLUENCING A  
23 POTENTIAL INVESTOR IN THE TYPE OF FUND INVOLVED TO  
24 PART WITH MONEY.

25 MR. FONG: YOUR HONOR, THAT PROPOSED

1 CHANGE IS ACCEPTABLE TO THE DEFENSE. HOWEVER, WE  
2 STILL FEEL VERY STRONGLY THAT THE SENTENCE ABOUT  
3 MATERIALITY DOES NOT MEAN THAT ANY PARTICULAR  
4 POTENTIAL INVESTOR SUCH AS MR. LIN OR MR. VERDIELL  
5 HAD TO JUSTIFIABLY RELY ON THE PRETENSE  
6 REPRESENTATION OR PROMISE.

7 SO WHAT WE WOULD ASK THE COURT TO DO IS  
8 TO STRIKE THAT. SENTENCE AND THEN WE COULD STRIKE  
9 THE WORD RATHER WITH THE NEXT SENTENCE THEN GO WITH  
10 WHAT THE COURT READ INTO THE RECORD.

11 WE BELIEVE THE SENTENCE ABOUT MATERIALITY  
12 DOES NOT MEAN, IS PROBLEMATIC IN LIGHT OF THE  
13 EVIDENCE SUBMITTED IN THIS CASE IN TERMS OF THE  
14 JURORS COULD SEE THAT AS A DIRECTIVE THAT THEY  
15 CANNOT CONSIDER WHAT IT IS THAT MR. VERDIELL -- THE  
16 QUESTION OF WHETHER OR NOT MR. VERDIELL ACTUALLY  
17 MEANT WHAT HE TESTIFIED TO WHEN HE SAID YES, I  
18 RELIED ON THE PILLSBURY LAW FIRM BEING THE COUNSEL  
19 FOR THE FIRESIDE FUND.

20 IN ESSENCE, THAT PARTICULAR SENTENCE  
21 WOULD TAKE AWAY THE SIGNIFICANCE OF WHETHER OR NOT  
22 THAT PARTICULAR STATEMENT OR THAT TESTIMONY WAS  
23 TRUE OR NOT.

24 MR. FAZIOLI: YOUR HONOR, FOR THE RECORD,  
25 MR. VERDIELL DID NOT -- I WANT TO BE CLEAR. HE DID

1 NOT TESTIFY ABOUT THE PILLSBURY FIRM. WE DID NOT  
2 ASK HIM ABOUT THAT SO I WANT THE RECORD TO BE CLEAR  
3 ON THAT.

4 SECONDLY, WE DO NOT BELIEVE THERE'S A  
5 JUSTIFIABLY ELEMENT IN THE STATUTE AND I THINK THEY  
6 BE INSTRUCTED AS PUT FORWARD HERE.

7 AS FOR THE --

8 MR. LUCEY: AND I WOULD ALSO ADD TO THE  
9 EXTENT WE STRIKE OUT THE SECOND SENTENCE OF THE  
10 COURT'S ORIGINAL INSTRUCTION BEGINNING AT  
11 MATERIALITY DOES NOT MEAN, IT ALMOST MAKES THE LAST  
12 SENTENCE MOOT BECAUSE IT ONLY INFORMS THE SENTENCE  
13 AHEAD OF IT.

14 MR. FONG: WHAT I WOULD SUGGEST,  
15 YOUR HONOR, IS THAT PERHAPS -- I APOLOGIZE. I'M  
16 READING FROM MY COPY WHICH HAS THE LINE NUMBER.  
17 BUT THE PARAGRAPH STARTING WITH, A PRETENSE,  
18 REPRESENTATION OR PROMISE IS MATERIAL.

19 PERHAPS THE BEST WAY TO ACCOMMODATE WHAT  
20 HAS BEEN SAID IS TO SIMPLY HAVE, THE SENTENCE THAT  
21 THE COURT READ PUT IN PLACE OF THAT SENTENCE AND  
22 THEN STOPPING THERE.

23 THAT IS TO SAY, SOMETHING ALONG THE LINES  
24 OF, IN ESSENCE, MATERIALITY IS DEFINED AS SOMETHING  
25 THAT HAS A NATURAL TENDENCY OR IS -- NATURAL

1 TENDENCY TO INFLUENCE OR BE CAPABLE OF INFLUENCING,  
2 I THINK THE COURT SAID SOMETHING TO THE EFFECT OF  
3 THE POTENTIAL INVESTORS IN THIS TYPE OF FUND TO  
4 WHICH THE PROMISES WERE MADE.

5 THEN SIMPLY END IT THERE. BECAUSE THE  
6 MODEL INSTRUCTION DOES NOT HAVE THE LANGUAGE  
7 CONCERNING FURTHER DEFINITION AND MATERIALITY. AND  
8 IT CERTAINLY DOES NOT BLEND MATERIALITY WITH  
9 RELIANCE

10 MR. FAZIOLI: THE MODEL INSTRUCTION  
11 INCLUDES THE WORD, A PERSON. I THINK IF THAT'S THE  
12 LANGUAGE IN THE MODEL INSTRUCTION THEN THAT'S  
13 CERTAINLY SOMETHING TO CONSIDER. THAT'S WHAT WE  
14 SUBMITTED IN OUR PROPOSED INSTRUCTION.

15 TO THE EXTENT THAT WE WERE GOING TO GO  
16 BEYOND A PERSON TO START IDENTIFYING IN MORE  
17 DETAIL, I THINK THE COURT'S DISCUSSION ABOUT A  
18 POTENTIAL INVESTOR COULD BE APPROPRIATE.

19 TO GET BEYOND THAT INTO A POTENTIAL  
20 INVESTOR IN THIS TYPE OF FUND THE CONCERNS WOULD BE  
21 CONFUSING BECAUSE THERE WOULD BE SOME POSSIBILITY  
22 THAT THERE WAS NOT A REALLY HEDGE FUND AT ALL IT  
23 WAS A FRAUDULENT SCHEME. AND TO GET TO THAT LEVEL  
24 OF DETAIL IN TERMS OF A POTENTIAL INVESTOR COULD BE  
25 PROBLEMATIC.

1 THE COURT: SO WHAT'S YOUR PROPOSAL?

2 MR. FAZIOLI: YOUR HONOR, OUR POSITION  
3 WOULD PROBABLY BE FOR MATERIALITY THAT WE COULD GO  
4 BACK TO THE LANGUAGE FROM THE INSTRUCTION WHICH IS  
5 THE PROMISES OR THE PRETEXT IS THAT THE LANGUAGE  
6 WERE MATERIAL, THAT IS THEY HAD A NATURAL TENDENCY  
7 TO INFLUENCE OR CAPABLE OF INFLUENCING A PERSON TO  
8 PART WITH MONEY OR PROPERTY.

9 IF THE COURT WOULD LIKE TO GIVE MORE  
10 SPECIFICITY ABOUT WHAT TYPE OF PERSON, THEN WE  
11 WOULD RECOMMEND A POTENTIAL INVESTOR.

12 MR. FONG: AND WE WOULD SUGGEST A  
13 POTENTIAL INVESTOR IN THIS TYPE OF FUND. BECAUSE  
14 REGARDLESS IF WHETHER OR NOT THE EVIDENCE SHOWS  
15 THERE WAS ACTUALLY EVER A FUND OR NOT, IT WAS CLEAR  
16 THAT THE SO CALLED SCHEME AS SUCH IF THERE WAS ONE,  
17 WOULD HAVE BEEN TARGETED TOWARD GETTING PEOPLE WHO  
18 WOULD BE INTERESTED IN THIS TYPE OF HEDGE FUND.

19 MR. FAZIOLI: I REALLY DO THINK THE TERM  
20 OF THIS TYPE OF HEDGE FUND IS CONFUSING.

21 THE COURT: I'M NOT GOING TO USE THAT.

22 LET ME READ THIS. A PRETENSE,  
23 REPRESENTATION OR PROMISE IS MATERIAL IF IT HAD A  
24 NATURAL TENDENCY TO INFLUENCE OR WAS CAPABLE OF  
25 INFLUENCING A POTENTIAL INVESTOR IN THE TYPE OF

1 FUND REPRESENTED TO PART WITH MONEY.

2 MR. FONG: THAT'S ACCEPTABLE TO THE  
3 DEFENSE, YOUR HONOR.

4 THE COURT: THEN I WAS GOING TO GO ON AND  
5 SAY, MATERIALITY DOES NOT MEAN THAT ANY PARTICULAR  
6 INVESTOR SUCH AS MR. LIN OR MR. VERDIELL HAD TO  
7 JUSTIFIABLY RELY ON THE PRETENSE, REPRESENTATION OR  
8 PROMISE, RATHER MATERIALITY ONLY REQUIRES THAT THE  
9 PRETENSE, REPRESENTATION OR PROMISE BE OF THE TYPE  
10 THAT WOULD HAVE THE TENDENCY TO INFLUENCE OR BE  
11 CAPABLE OF INFLUENCING AN INVESTOR. OR SUCH AN  
12 INVESTOR TO PART WITH MONEY.

13 MR. FAZIOLI: YOUR HONOR, WE WOULD, OUR  
14 CONCERN ABOUT THE REFERENCE TO THE TYPE OF FUND IS  
15 WHETHER THIS WOULD INTRODUCE A CIRCUMSTANCE WHERE  
16 NOW THE STANDARD IS NOT A PERSON WHICH ISN'T IN THE  
17 MODEL INSTRUCTIONS BUT NOW A VERY GENERAL CATEGORY  
18 ABOUT A PARTICULAR SUBSECTION OF PEOPLE THAT WOULD  
19 INVEST IN A FUND AND THAT IT PRESUPPOSES CERTAIN  
20 THINGS ABOUT WHETHER THIS WAS A FUND ADD ALL WHICH  
21 I THINK THERE'S A DISPUTE ABOUT WHETHER THIS WAS A  
22 LEGITIMATE HEDGE FUND. ALTHOUGH I DON'T THINK  
23 THERE'S A DISPUTE THAT PEOPLE INVESTED MONEY.

24 AND SECONDLY, THAT IT -- I'M CONCERNED IT  
25 WILL BE CONFUSING ABOUT THERE WILL BE DISCUSSIONS



1 ABOUT WHO WOULD INVEST IN A HEDGE FUND OR GENERAL  
2 TYPE OF TESTIMONY ABOUT THAT WHICH WE THINK IS  
3 BEYOND WHAT THE INSTRUCTIONS ARE OR WHAT THE  
4 STANDARD OF MATERIALITY IS. WE DON'T WANT A  
5 CIRCUMSTANCE WHERE IT SORT OF IS I THINK SOMEWHAT  
6 POSSIBLY CONFUSING WHEN YOU GET BEYOND THE  
7 POTENTIAL INVESTOR LANGUAGE.

8 I MEAN, WE DID NOT INTRODUCE, I THINK  
9 THERE WOULD BE EVIDENCE TO SUPPORT AN INFERENCE OF  
10 GUILTY UNDER THIS CIRCUMSTANCE. BUT THERE WOULD BE  
11 A QUESTION OF WHETHER --

12 THE COURT: WELL, ARE YOU SATISFIED IF I  
13 JUST SAY, A PRETENSE REPRESENTATION OR PROMISE IS  
14 MATERIAL IF IT HAD A NATURAL TENDENCY TO INFLUENCE  
15 OR WAS CAPABLE OF INFLUENCING A POTENTIAL INVESTOR  
16 TO PART WITH MONEY?

17 MR. FAZIOLI: YES.

18 MR. LUCEY: FROM THE GOVERNMENT'S POINT  
19 OF VIEW, YES.

20 MR. FONG: WE WOULD URGE THE COURT TO PUT  
21 BACK IN THE LANGUAGE ABOUT THIS TYPE OF FUND.

22 AND WE WOULD MAINTAIN OUR REQUEST THAT  
23 THE COURT STRIKE -- WE UNDERSTAND THE COURT HAS  
24 PROBABLY MADE ITS RULING. BUT WE WOULD FOR THE  
25 RECORD, WE WOULD ASK THE COURT TO STRIKE THE

1 SENTENCE ABOUT MATERIALITY DOES NOT MEAN THAT ANY  
2 PARTICULAR INVESTOR SUCH AS --

3 THE COURT: I'M NOT SURE THE GOVERNMENT'S  
4 ASKING THAT THAT BE INCLUDED AT THIS POINT, ARE  
5 YOU?

6 MR. FAZIOLI: I THINK THAT THE COURT  
7 COULD INCLUDE THE SUBSECTION THREE AND JUSTIN STEAD  
8 OF REFERRING TO A PERSON IT COULD REFER TO IT AS A  
9 POTENTIAL INVESTOR. THAT WOULD BE ACCEPTABLE TO  
10 THE GOVERNMENT, YOUR HONOR. AND IT WOULD LEAVE THE  
11 DEFENSE FREE TO ARGUE THAT A POTENTIAL INVESTOR  
12 SHOULD INCLUDE A PARTICULAR CONTEXT. AND WE WOULD  
13 BE FREE TO ARGUE AN ALTERNATIVE CONTEXT.

14 THE COURT: ALL RIGHT. ON THE PARAGRAPH  
15 I HAVE STARTING AT THE BOTTOM OF PAGE 14 AND  
16 RUNNING ON TO THE FIRST LINE OF PAGE 15, I'M NOT  
17 SURE I UNDERSTAND WHERE YOU EACH ARE.

18 ARE YOU SUBSTITUTING FOR THAT PARAGRAPH  
19 IS THE GOVERNMENT SATISFIED WITH A PRETENSE,  
20 REPRESENTATION OR PROMISE IS MATERIAL IF IT HAD A  
21 NATURAL TENDENCY TO INFLUENCE OR WAS CAPABLE OF  
22 INFLUENCING A POTENTIAL INVESTOR TO PART WITH  
23 MONEY?

24 MR. LUCEY: THEN STRIKING THE BALANCE OF  
25 THAT PARAGRAPH, YOUR HONOR. YES, YOUR HONOR.

1                   MR. FAZIOLI:   YES.   WE WOULD BE  
2                   ACCEPTABLE WITH THAT.

3                   MR. FONG:   AND YOUR HONOR, THAT WOULD BE  
4                   ACCEPTABLE, EXCEPT AGAIN I WOULD ASK THE COURT PUT  
5                   IN THE LANGUAGE AN INVESTOR IN THAT TYPE OF FUND,  
6                   OR LANGUAGE TO THAT EFFECT.   I UNDERSTAND THE COURT  
7                   IS NOT INCLINED TO DO THAT BUT I WANT TO STATE FOR  
8                   THE RECORD THAT IS WHAT THE DEFENSE IS REQUESTING.

9                   THE COURT:   OKAY.   I WILL JUST LEAVE THIS  
10                  SIMPLE SENTENCE AS I READ IT.

11                  MR. FONG:   AND YOUR HONOR, JUST AS A TYPO  
12                  MATTER, WE LOOK AT WHAT IS NOW THE PARAGRAPH  
13                  STARTING WITH SECOND, THE FRAUDULENT PRETENSE  
14                  REPRESENTATIONS OR PROMISES WERE MADE AS PART OF  
15                  THE SCHEME OR PLAN WERE MATERIAL.

16                  I BELIEVE THE FIRST WORD SHOULD BE  
17                  STRICKEN SO THAT IT SHOULD READ, THE SECOND, THE  
18                  FRAUDULENT PRETENSE REPRESENTATIONS OR PROMISES  
19                  MADE AS PART OF THE SCHEME OR PLAN WERE MATERIAL.

20                  THE COURT:   YOU LOST ME.

21                  MR. FONG:   OKAY.   THE SENTENCE READS.  
22                  SECOND, THE FRAUDULENT PRETENSES, REPRESENTATIONS  
23                  OR PROMISES --

24                  MR. FAZIOLI:   IT SHOULD SAY, THAT WERE  
25                  MADE.

1           MR. FONG: I THINK THAT WERE MADE SHOULD  
2           SIMPLY BE MADE.

3           MR. FAZIOLI: IT SHOULD SAY THAT WERE  
4           MADE AS PART OF THE SCHEME.

5           THE COURT: I'M TOTALLY MISSING  
6           SOMETHING.

7           MR. LUCEY: YOUR HONOR, LOOKING AT YOUR  
8           PROPOSED INSTRUCTION, THE SECOND ELEMENT, THE  
9           FRAUDULENT PRETENSES. THE GOVERNMENT SUGGESTS  
10          TRYING TO ADDRESS THE POINTS MR. FONG IS RAISING.

11          THE FRAUDULENT PRETENSES REPRESENTATIONS  
12          OR PROMISES, ADDING IN, THAT WERE MADE, AS PART OF  
13          THE SCHEME OR PLAN, WERE MATERIAL.

14          MR. FONG: BECAUSE I BELIEVE THAT  
15          GRAMMATICALLY AS IT IS NOW IS SOMEWHAT CONFUSING.  
16          AND PERHAPS IT'S SIMPLY CONFUSING TO ME.

17          MR. LUCEY: I THINK MR. FONG IS CORRECT  
18          THAT IT COULD BE READ SOMEHOW INDICATING THAT  
19          SOMEHOW THAT IT'S ALREADY BEEN PROVED SOMEHOW IN  
20          THAT PORTION OF THE INSTRUCTION.

21          THE COURT: I DON'T GET IT BUT I DON'T  
22          HAVE ANY PROBLEM WITH THAT WERE MADE. BEING THE  
23          THREE WORDS FOLLOWING PROMISES.

24          MR. FONG: AND JUST TO BE CLEAR,  
25          YOUR HONOR, GOING BACK TO 13. DID THE COURT, AND I

1 APOLOGIZE IF I SIMPLY MISSED THE COURT'S RULING.  
2 DID THE COURT MAKE A RULING ON THE, MY PROPOSED  
3 ADDITIONS, THE TWO SENTENCES WHICH I CONTEND CAME  
4 FROM PARAGRAPH SIX AND PARAGRAPH 14 RESPECTIVELY  
5 FROM THE INDICTMENT?

6 THE COURT: I THINK I PASSED ON THOSE  
7 BECAUSE I KNEW THE ISSUE WAS GOING TO COME UP WITH  
8 RESPECT TO INSTRUCTION 14.

9 SO I HAVE NOT RULED ON THAT BUT IT SEEMS  
10 TO ME THAT THE ADDITIONS YOU PROPOSE ARE NOT  
11 NECESSARY AND NOT REQUIRED.

12 MR. FONG: THANK YOU, YOUR HONOR.

13 THE COURT: IS THERE ANYTHING ELSE?

14 MR. FAZIOLI: TWO QUICK POINTS.

15 JURY INSTRUCTION NUMBER 15, FRAUDULENT  
16 STATEMENTS REPRESENTATIONS OR PROMISES. TWO POINTS  
17 ABOUT THIS.

18 ONE, THE GOVERNMENT IS NOT SURE THAT  
19 WE -- THAT AN INSTRUCTION IS REQUIRED IN GENERAL.

20 THE COURT: A WHAT?

21 MR. FAZIOLI: WE ARE NOT SURE THAT IT IS  
22 PARTICULARLY NECESSARY TO LAY OUT THE PARTICULAR  
23 FALSE STATEMENTS AND SUCH INSTRUCTION AS SORT OF A  
24 THRESHOLD MATTER AT ALL.

25 IF THE COURT IS INCLINED TO DO SO, THEN

1 TWO OF THESE ALLEGED FALSE STATEMENTS THAT WERE IN  
2 THE INDICTMENT ABOUT THE PILLSBURY WINTHROP FIRM  
3 AND THE HELLER ERHMAN LAW FIRM, ALTHOUGH WE DO  
4 THINK THE STATEMENTS ARE FALSE, THE GOVERNMENT  
5 CHOSE NOT TO PRESENT EVIDENCE REGARDING THE  
6 PILLSBURY WINTHROP FIRM AND HELLER ERHMAN FIRM IN  
7 ITS CASE IN CHIEF.

8 WE THINK UNDER THOSE CIRCUMSTANCES THE  
9 TWO FALSE STATEMENTS SHOULD NOT BE IN THE LIST OF  
10 THE FALSE STATEMENTS BEING PRESENTED TO THE JURY

11 MR. LUCEY: THE DANGER YOUR HONOR IS IF  
12 THEY WERE INCLUDED POTENTIALLY THERE COULD BE AN  
13 ISSUE OF IT BEING PART OF THE INSTRUCTION. THEN  
14 THE RECORD AS MR. FAZIOLI SUMMARIZED IT, THEN THE  
15 ISSUE ABOUT THE VERDICT REACHED BY THE JURY THERE  
16 AFTER.

17 THE COURT: IF YOU ARE NOT MAKING A CLAIM  
18 THAT THOSE STATEMENTS ARE FALSE THEN IT SEEMS TO ME  
19 THEY CAN GO OUT.

20 MR. FONG: YOUR HONOR, WE BELIEVE THAT  
21 THEY SHOULD STAY IN BECAUSE IT WOULD ACCURATELY  
22 REFLECT WHAT THE GOVERNMENT INDICTED THE CASE ON.

23 AND I DO NOT BELIEVE THE GOVERNMENT CAN  
24 NOW CHOOSE TO SELECT PART OF THE INDICTMENT. THIS  
25 IS WHAT THEY CHARGED. AND I THINK THE JURORS ARE

1 ENTITLED TO KNOW THAT SO THAT THEY GET THE COMPLETE  
2 PICTURE.

3 MR. FAZIOLI: YOUR HONOR, AGAIN, WE ARE  
4 NOT --

5 THE COURT: IT SEEMS TO ME IT'S LIKE  
6 ANYTHING ELSE. I MEAN, I WOULD HAVE TO LOOK BACK,  
7 BUT I THINK IF THERE WAS A REQUEST BY THE DEFENSE I  
8 WOULD HAVE TO STRIKE -- IT JUST SEEMS TO ME IF THE  
9 GOVERNMENT FAILS TO PROVE A PORTION OF ITS CASE  
10 THAT THAT IS REALLY IRRELEVANT FOR THE JURY'S  
11 PURPOSES. THEY'VE GOT TO FIND THAT ONE OF THESE  
12 STATEMENTS IS FALSE TO WIN THE CASE.

13 AND I DON'T THINK THE FACT THAT THERE MAY  
14 BE IN THE INDICTMENT A STATEMENT THAT WAS ALLEGED  
15 AS FALSE THAT THEY HAVEN'T PROVED AS FALSE MEANS  
16 THAT YOU LEAVE THAT IN FOR THE JURY TO CONSIDER.

17 MR. LUCEY: AND YOUR HONOR TWO POINTS.

18 ONE AS THE COURT IS AWARE, THE GOVERNMENT  
19 TYPICALLY CHARGES THE CONDUCT PROVES DISJUNCTIVE IN  
20 ITS MATTERS.

21 AND SECONDLY, A VARIANCE WOULD BE IF WE  
22 ARE ADDING MATERIAL IN AT THIS POINT NOT REDUCING  
23 THE AMOUNT OF PROOF.

24 THE COURT: I AGREE.

25 MR. FAZIOLI: SO WE WOULD REQUEST THAT

1       SECTIONS -- TO THE EXTENT THE COURT IS INCLINED TO  
2       GIVE AN INSTRUCTION LAYING OUT THE --

3               THE COURT:   I THINK THE SPECIFIC  
4       STATEMENTS OUGHT TO BE GIVEN BECAUSE IF YOU BOTH  
5       SEEM IT FEEL THAT THERE NEEDS TO BE AN AGREEMENT ON  
6       A PARTICULAR STATEMENT THAT WAS MADE, THEREFORE I  
7       THINK IT OUGHT TO BE SPELLED OUT TO WHAT THE  
8       CHOICES ARE.

9               MR. FAZIOLI:   I THINK IF THE COURT IS  
10       INCLINED TO DO THAT IT SHOULD DELETE SUBPARAGRAPHS  
11       BAND D.

12              THE COURT:   I AGREE.

13              MR. FAZIOLI:   ONE LAST COMMENT THAT I  
14       THINK, I DON'T KNOW IF THE DEFENSE WAS GOING TO  
15       RAISE BUT IT WAS IN HIS WRITTEN EDITS OF JURY  
16       INSTRUCTION NUMBER TWO.

17              MR. FONG:   YOUR HONOR ON INSTRUCTION  
18       NUMBER TWO, I BELIEVE THERE'S AN AGREEMENT THAT THE  
19       LAST SENTENCE SHOULD READ --

20              THE COURT:   I AGREE.   I DON'T HAVE ANY  
21       PROBLEM WITH YOUR EACH OF.

22              MR. FAZIOLI:   WELL, WE ACTUALLY HAD A THE  
23       ISSUE WITH THAT.

24              ONE BECAUSE I THINK IT MAY SLIGHTLY  
25       DIFFER FROM THE PATTERN INSTRUCTIONS.



1                   AND TWO, THERE MAY BE A REASON FOR THAT.

2                   THE COURT:   PATTERN INSTRUCTIONS ARE  
3   INTENDED TO BE MODIFIED THEY ARE NOT SUPPOSED TO BE  
4   JUST --

5                   MR. LUCEY:   FAIR ENOUGH, YOUR HONOR.

6                   MR. FAZIOLI:   WE ACTUALLY DO HAVE A  
7   PROBLEM WITH IT.   SAYING THE GOVERNMENT HAS THE  
8   BURDEN OF PROVING EVERY ELEMENT OF EACH OF THE  
9   CHARGES BEYOND A REASONABLE DOUBT WE THINK COULD BE  
10  SOMEWHAT CONFUSE NOTHING THAT IT COULD, THE JURY  
11  COULD GET THE MISIMPRESSION THAT WE HAVE TO PROVE  
12  ALL OF THE CHARGES BEYOND A REASONABLE DOUBT IN  
13  ORDER TO --

14                  THE COURT:   WHAT IF YOU JUST SAY THE  
15  GOVERNMENT HAS THE BURDEN OF PROVING EVERY ELEMENT  
16  OF EACH COUNT BEYOND A REASONABLE DOUBT.

17                  MR. FONG:   THAT'S FINE, YOUR HONOR.

18                  MR. FAZIOLI:   I THINK THE CONCERN WOULD  
19  BE THAT THE JURY WOULD THINK THAT WE HAVE TO PROVE  
20  ALL OF THE COUNTS IN ORDER FOR THEM TO FIND THEM  
21  GUILTY ON ANY OF THE COUNTS.

22                  AND I THINK THERE'S AN INSTRUCTION THAT  
23  IF THE LANGUAGE SAYS PROVE EVERY ELEMENT OF THE  
24  CHARGE BEYOND A REASONABLE DOUBT, THE COURT IS ALSO  
25  INSTRUCTING THEM THAT THEY HAVE TO CONSIDER EACH

1 COUNT SEPARATELY. THAT SHOULD I THINK BE  
2 SUFFICIENT.

3 I DON'T WANT A CIRCUMSTANCE FOR THEM TO  
4 THINK TO FIND A CONVICTION ON ANY THEY HAVE TO FIND  
5 A CONVICTION BEYOND A REASONABLE DOUBT AS TO ALL.

6 THE COURT: I CAN'T BELIEVE YOU GUYS.

7 MR. LUCEY: IT'S ONLY THE CONCERN,  
8 YOUR HONOR, ONLY OUT OF AN ABUNDANCE OF CAUTION. I  
9 UNDERSTAND THE COURT'S CONCERNS THAT MAYBE WE ARE  
10 BEING HYPER TECHNICAL.

11 MR. FAZIOLI: THE COURT'S INJURY  
12 INSTRUCTION 11 DOES SAY A SEPARATE CRIME IS CHARGED  
13 AGAINST MR. HU IN EACH COUNT. YOU MUST DECIDE EACH  
14 COUNT SEPARATELY.

15 MR. LUCEY: PERHAPS WE COULD ADDRESS  
16 MR. FONG'S CONCERN THERE. BECAUSE IN CONTEXT IT  
17 MIGHT BE CLEAR TO THE JURY IF WE SAID IN THE SECOND  
18 SENTENCE, OF YOUR NUMBER 11, YOUR HONOR, YOU MUST  
19 CITE EACH ELEMENT OF EACH COUNT SEPARATELY.

20 MR. FAZIOLI: NO, I THINK IT'S FINE.

21 NO, IT'S A SEPARATE INSTRUCTION. FOLLOWS  
22 THE PATTERN INSTRUCTION, IT MAKES SENSE. WE DON'T  
23 WANT TO MODIFY JURY INSTRUCTION 11.

24 THE COURT: I COULD SAY, THE GOVERNMENT  
25 HAS THE BURDEN OF PROVING EVERY ELEMENT OF EACH

1 COUNT BEYOND A REASONABLE DOUBT IN ORDER TO FIND  
2 DEFENDANT GUILTY OF THAT COUNT.

3 MR. FONG: THAT WOULD BE ACCEPTABLE TO  
4 THE DEFENSE, YOUR HONOR.

5 MR. FAZIOLI: HOW ABOUT THE POSSIBLE  
6 MODIFICATION.

7 THE GOVERNMENT HAS THE BURDEN OF PROVING  
8 EVERY ELEMENT OF A COUNT BEYOND A REASONABLE DOUBT,  
9 A COUNT, IN ORDER TO FIND THE DEFENDANT GUILTY OF  
10 THAT COUNT.

11 MR. FONG: THE DEFENSE WOULD GO WITH THE  
12 COURT'S FORMULATION EARLIER. I THINK THAT'S CLEAR.

13 THE COURT: THE GOVERNMENT HAS THE BURDEN  
14 OF PROVING EVERY ELEMENT OF A COUNT BEYOND A  
15 REASONABLE DOUBT BEFORE THE DEFENDANT CAN BE FOUND  
16 GUILTY OF THAT COUNT.

17 MR. FONG: THAT'S ACCEPTABLE TO THE  
18 DEFENSE, YOUR HONOR.

19 MR. FAZIOLI: I THINK THAT'S ACCEPTABLE,  
20 YOUR HONOR.

21 THE COURT: OKAY.

22 MR. LUCEY: YES, YOUR HONOR.

23 THE COURT: I THINK WE ARE DONE, RIGHT?

24 MR. FONG: THANK YOU VERY MUCH.

25 MR. FAZIOLI: SO THE GOVERNMENT WILL

1 E-MAIL THE COURT A COPY OF THE TRIAL STIPULATION  
2 THAT HAS THE TABLE.

3 THE COURT: YEAH. AND WOULD YOU EACH --  
4 I WILL MAKE THE CHANGES AND I WILL MAIL THEM TO  
5 YOU.

6 WOULD YOU EACH CONFIRM THAT I MADE THE  
7 CHANGES YOU WANTED ME TO MAKE?

8 MR. FAZIOLI: YES WE WILL, YOUR HONOR.

9 MR. FONG: YES, YOUR HONOR.

10 MR. FAZIOLI: THANK YOU.

11 MR. LUCEY: AND YOUR HONOR, 8:30 TOMORROW  
12 MORNING?

13 THE COURT: YES.

14 MR. LUCEY: PRE-CHARGE OR POST-CHARGE IN  
15 TERMS OF CLOSING?

16 THE COURT: I THOUGHT WE DECIDED BUT I'M  
17 HAPPY TO GO EITHER WAY THAT I WOULD INSTRUCT AFTER.

18 MR. FONG: THAT'S FINE BY THE DEFENSE,  
19 YOUR HONOR.

20 MR. FAZIOLI: THAT'S FINE BY THE  
21 GOVERNMENT AS WELL.

22 THE COURT: IF YOU BOTH PREFER I DO IT  
23 BEFORE I WILL DO IT BEFORE.

24 MR. FONG: I WOULD PREFER STAY THE WAY IT  
25 IS.

1 MR. FAZIOLI: THEN THAT SETTLES IT.

2 (WHEREUPON, THE PROCEEDINGS IN THIS  
3 MATTER WERE CONCLUDED.)  
4  
5  
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**CERTIFICATE OF REPORTER**

I, THE UNDERSIGNED OFFICIAL COURT  
REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,  
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
TRANSCRIPTION TO THE BEST OF MY ABILITY.

A handwritten signature in dark ink, appearing to read "Summer A. Fisher", is written over a light blue horizontal rectangular background.

SUMMER A. FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

DATED: 6/19/12